BRB No. 07-0730 BLA

E.P.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 05/21/2008
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Barry H. Joyner (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (2006-BLA-5152) of Administrative Law Judge Larry S. Merck on a subsequent claim[1] filed pursuant to the

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

A claim filed after the denial of a previous claim is referred to a as a "duplicate claim" under the prior regulations, and as a "subsequent claim" under the amended regulations. *See* 20 C.F.R. §§725.309 (2000); 725.309.

provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge credited claimant with thirteen years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] Based on the concession of the Director, Office of Workers' Compensation Programs (the Director), that claimant established the existence of pneumoconiosis, the administrative law judge determined that claimant established a change in an applicable condition of entitlement since the denial of his prior claim pursuant to 20 C.F.R. §725.309. Considering the claim on the merits, the administrative law judge determined that the evidence was insufficient to establish that claimant had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Because he found that claimant was not totally disabled, the administrative law judge further found that claimant was unable to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred by failing to find Dr. Baker's opinion, considered in conjunction with the exertional requirements of his usual coal mine work, to be sufficient to establish that he is totally disabled pursuant to Section 718.204(b)(2)(iv).[3] The Director responds urging affirmance of the denial of benefits.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational,

[2] Claimant filed an initial claim for benefits on July 15, 1986, which was denied by the district director on December 16, 1986, because the evidence was insufficient to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant filed a duplicate claim on July 14, 2000. Director's Exhibit 2. The district director denied benefits on November 16, 2000, on the ground that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Claimant took no further action until he filed his subsequent claim on December 6, 2004. *Id.*

[3] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant has pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203, that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §718.309(d), and his findings that the evidence was insufficient to establish that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

and is in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 363 (1965).

After considering the administrative law judge's Decision and Order, the briefs of the parties, and the evidence of record, we affirm the administrative law judge's denial of benefits as it is supported by substantial evidence. Specifically we affirm the administrative law judge's finding that claimant is not totally disabled.

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that he is totally disabled due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

Because the administrative law judge determined that claimant established the existence of pneumoconiosis and a change in an applicable condition of entitlement, he properly considered the record as a whole relevant to the merits of the claim. *See* 20 C.F.R. §725.309; *White v. New White Coal Co.*, 23 BLR 1-1 (2004). Noting that the medical evidence developed in conjunction with claimant's initial claim, filed on July 15, 1986, was over twenty years old, the administrative law judge accorded greater weight to the evidence submitted with claimant's July 14, 2000 duplicate claim and the current subsequent claim. Decision and Order at 5. In this regard, the administrative law judge found that there were only two pertinent medical reports of record. Dr. Baker conducted an examination of claimant at the request of the Department of Labor (DOL) on September 8, 2000. Director's Exhibit 2. Dr. Baker opined that claimant had a mild respiratory impairment, but in response to the question of whether claimant was totally disabled, Dr. Baker answered "No" by check-marking the appropriate box on the DOL form. *Id*. Dr. Baker subsequently examined claimant at the request of DOL on March 4, 2005. Director's Exhibit 16. Dr. Baker diagnosed a borderline class two impairment,[5] and further stated that claimant "should be able to do the work of a coal miner or

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant was employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 5.

[5] Dr. Baker also stated, "[Claimant's] vital capacity is between 60 and 79 [percent] of predicted. This would be a class 2 impairment or 10 to 25 [percent] impairment of the whole person. This is based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition." Director's Exhibit 16.

comparable work in a dust free environment." *Id.* After reviewing Dr. Baker's reports, the administrative law judge concluded that claimant was not totally disabled. Decision and Order at 8.

Claimant asserts that in addressing the issue of total disability pursuant to Section 718.204(b)(2)(iv), the administrative law judge was required to consider the exertional requirements of claimant's usual coal mine work in conjunction with the physicians' assessments regarding the extent of any respiratory or pulmonary impairment. Claimant's Brief at 7, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). Specifically, claimant argues that:

> The claimant's usual coal mine work included being a heavy equipment operator. It can be reasonably concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties, as well as the medical opinion of Dr. Baker (who diagnosed a pulmonary impairment), it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis. [The administrative law judge] made no mention of the claimant's usual coal mine work in conjunction with Dr. Baker's opinion of disability.

Claimant's Brief at 3. Claimant's argument is without merit.

Contrary to claimant's suggestion, Dr. Baker's opinion that claimant should avoid further coal dust exposure is not equivalent to a diagnosis of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83 (1988). Furthermore, we see no merit in claimant's assertion that the administrative law judge failed to consider his usual coal mine work. The administrative law judge specifically noted that claimant worked as a general laborer, miner helper, roof bolter, and part time boss. Decision and Order at 3; Director's Exhibits 1, 2, 5, 6. Dr. Baker also indicated that he was aware of claimant's usual coal mine employment, and specifically opined that claimant should be able to do the work of a coal miner.[6] Because the administrative law judge properly relied on Dr. Baker's uncontradicated medical opinion that claimant is not totally disabled by a respiratory or

[6] Dr. Baker noted that he was provided a copy of claimant's employment history, Form CM-911a, and further stated that claimant worked as a "roof bolter, miner helper, general labor[er], part time boss." Director's Exhibit 16. Since the parties waived the right to an oral hearing, claimant did not provide any further description of the exertional requirements of his job, other than provided on Form CM-911a.

pulmonary impairment, we affirm the administrative law judge's finding at Section 718.204(b)(2)(iv).

We also reject claimant's argument that pneumoconiosis is a progressive disease that must have worsened, thus affecting his ability to perform his usual coal mine employment. Claimant's Brief at 7-8. An administrative law judge's findings cannot be based on assumptions; they must be based solely on the medical evidence of record. *White*, 23 BLR at 1-7 n.8. As claimant makes no other specific challenge to the administrative law judge's weighing of the evidence, we affirm his finding that claimant failed to establish total disability pursuant to Section 718.204(b)(2).

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element of entitlement. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Because claimant has failed to establish total disability, a requisite element of entitlement under 20 C.F.R. Part 718, benefits are precluded *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge